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No. 88-1786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TWIN MANORS WEST OF MORTON GROVE CONDOMINIUM ASSOCIATION,

Petitioner,

v.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether certiorari should be granted to review Petitioner's constitutional arguments based on the supposed cost of a statistical study, where Petitioner failed to present any evidence of the study's cost to the Illinois courts, and where those courts made no specific findings concerning such a cost.

2. Whether a taxpayer claiming that its property is assessed at a discriminatory level may be required to compare its assessment to the average assessment level of other property in its class throughout the taxing jurisdiction consistently with the doctrines of equal protection and due process.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner is a condominium association comprising thirty-three homeowners and taxpayers in the County of Cook, Illinois. On behalf of its members, Petitioner brought a

tax objection[1] in the Circuit Court of Cook County challenging the assessments for the 1981 tax year upon the subject real estate, a thirty-three unit condominium development.

The development is located within Maine Township, one of thirty-eight townships into which Cook County is divided. Petitioner's objection contended that the subject property was assessed at a higher "assessment level" or percentage of market value than the average assessment level of other property in Petitioner's class, within Maine Township. Petitioner stipulated, however, that its objection would in no way address the assessment level of the other property in Petitioner's class in the other thirty-seven townships of Cook County outside of Maine.

The Illinois Constitution authorizes Cook County to classify real estate for purposes of property taxation. The relevant provision of the Illinois Constitution is Section 4(b) of Article IX, which provides in pertinent part:

> Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to [sic] continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class.

* * *

[1] The Illinois tax objection procedure allows taxpayers to challenge their assessments in court after administrative remedies are exhausted. The disputed tax is paid under protest and is then refunded if the objection is successful. Ill. Rev. Stat. 1987, ch. 120, ¶¶675 and 716. This procedure is described in some detail in this Court's opinion in *Rosewell v. LaSalle National Bank*, 450 U.S. 506, 508-510, nn. 6-7 (1981), which held the tax objection to be a plain, speedy and efficient remedy for purposes of 28 U.S.C. §1341.

Ill. Const. 1970, Art. IX, §4(b). The Illinois General Assembly has provided that assessment classes under Section 4(b) must be established by ordinance of the county board. Ill. Rev. Stat. 1987, ch. 120, ¶501a.

Pursuant to this authority, Cook County has established an assessment system in which properties are classified according to type and use and are assessed for tax purposes at prescribed "levels of assessment" or percentages of market value. The subject real estate is categorized as Class II property and is assessed at sixteen percent (16%) of fair market value. Cook County Real Property Assessment Classification Ordinance §§2, 3 (1980). Class II contains farm property, single-family homes, apartment buildings of not more than six living units, and residential condominiums. *Id.* §2; see also, Ill. Rev. Stat. 1987, ch. 120, ¶501c-1 (owner-occupied condominiums to be classified with single-family residences). Class II property is located throughout the county.

Cook County is divided into four quadrants or assessment districts. Maine Township, in which the subject property is located, is part of the Northwest quadrant. All classes of property are reassessed in one of the quadrants each year in rotation, so that all property in the county is reassessed every four years. Ill. Rev. Stat. 1987, ch. 120, ¶¶511, 524.

In Cook County, county officials perform the ultimate acts of assessing, imposing, and collecting real estate taxes. The Cook County Assessor is the elected official responsible for assessing all real property in the county. Ill. Rev. Stat. 1987, ch. 120, ¶487. The county Board of (tax) Appeals, made up of two elected county officials, is responsible for reviewing real property assessments in Cook County. Ill. Rev. Stat. 1987, ch. 120, ¶492. Similarly, the Cook County Treasurer, the Respondent here, is

responsible for the collection of property taxes throughout the county. Ill. Rev. Stat. 1987, ch. 120, ¶657.

In the property tax system established under the Illinois Revenue Act, as in all *ad valorem* tax systems, each taxpayer's tax bill is computed by extending the tax levies of the various taxing bodies or districts against the assessments of property within those districts. See, *e.g.*, Ill. Rev. Stat. 1987, ch. 120, ¶643. Thus each taxpayer's share of the overall tax burden is determined by the assessed value of his property in relation to the assessed value of all other properties located within all the relevant taxing districts.

There are over 600 taxing districts in Cook County. The boundaries of these taxing bodies generally overlap township lines so that all taxpayers in Cook County pay real estate taxes to a number of different taxing authorities. This is best illustrated by reviewing the Petitioner's tax burden. The Petitioner pays real estate taxes to fifteen different taxing bodies. Only four of these bodies are located wholly within Maine Township. Three of the taxing bodies cover all townships outside the City of Chicago, and three more cover the entire county. In all, only thirty-one percent (31%) of the Petitioner's real estate tax burden is accounted for by Maine Township taxing bodies and the remaining sixty-nine percent (69%) is accounted for by taxing bodies extending beyond Maine Township's boundaries.

Petitioner proposed to offer studies claiming that its property's assessment level was greater than the true and actual average assessment level of other Class II property in Maine Township. The Petitioner made no allegation and expressly declined to offer any evidence concerning the level of assessment for Class II property throughout the county. The Respondent moved for summary judgment arguing that the appropriate geographic area for compar-

ing levels of assessment was the entire county and not any individual township. After a full hearing, the trial court ruled that the Petitioner must establish the county-wide level of assessment and granted the motion for summary judgment.

Contrary to Petitioner's contention "that the uncontradicted evidence is that the minimum cost of a county-wide study [of assessment levels] would be $17,000" (Pet. at 12, 14), the trial court did not have before it any evidence concerning the cost of a county-wide study. The $17,000 figure appears in the record only as the offhand comment of Petitioner's counsel, speculating on the cost of one of four county-wide studies produced by another taxpayer in another Cook County case. (Pet. App. D, at 72a) The Treasurer contradicted this speculation, pointing out that the cost of the *Class II* studies in the other case could not have been as high as Petitioner's figure. (Pet. App. D, at 85a-87a.) The trial court made no specific findings concerning the cost of a county-wide assessment study to this Petitioner or to anyone, nor any findings concerning Petitioner's ability to fund such a study.[2]

The Illinois Appellate Court affirmed the judgment for Respondent, finding that the Petitioner failed to show that its property was taxed disproportionately to the other Class II property throughout the county. *Rosewell v. Twin Manors West of Morton Grove Condominium Assn.*, 175 Ill.App.3d 564, 529 N.E.2d 1104 (1st Dist. 1988). The Petitioner's petition for leave to appeal was denied by the Illinois Supreme Court and the Petitioner filed a petition for certiorari.

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[2] Thus, the statement in the petition for certiorari that "The trial court granted the Collector's [Respondent's] motion for summary judgment because Petitioner did not have the $17,000 study" (Pet. at 14) misrepresents the record insofar as it implies such a finding.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW PETITIONER'S CONSTITUTIONAL ARGUMENTS BASED ON THE SUPPOSED COST OF A STATISTICAL STUDY, WHERE PETITIONER FAILED TO PRESENT ANY EVIDENCE OF THE STUDY'S COST TO THE ILLINOIS COURTS, AND WHERE THOSE COURTS MADE NO SPECIFIC FINDINGS CONCERNING SUCH A COST.

Petitioner's constitutional contentions are based almost entirely on allegations in the petition for certiorari that the minimum cost of a statistical study showing the county-wide level of tax assessments for its class of property would be prohibitive. (*E.g.* Pet. at 9, 12, 14, 39) Petitioner argues that this cost precludes taxpayers who are not wealthy from challenging their tax assessments, in violation of equal protection and due process. (Pet. at 22-30) Petitioner's arguments are unfounded, but this Court need not reach them. Certiorari should be denied as a threshold matter, because the record in this case does not contain any evidence to support Petitioner's factual allegations concerning the cost of a county-wide statistical study of assessments within Petitioner's class ("Class II"). Furthermore, the record reveals that the Illinois courts did not make any specific findings or rulings concerning the cost of such a study.

Petitioner alleges that the "uncontradicted evidence" is that the "minimum cost of a county-wide study would be $17,000." (Pet. at 12) It further alleges that "The trial court granted the . . . [Respondent's] motion for summary judgment because Petitioner did not have the $17,000 study." (Pet. at 14) Petitioner further alleges that this

"$17,000 cost" is prohibitive to most taxpayers and that only the wealthy or large corporations can afford it. (Pet. at 27-28) The record in this case, however, reveals that no evidence was presented concerning these allegations, and that the trial court did not make the finding attributed to it.

The $17,000 figure appears in the record only as the offhand speculation of Petitioner's counsel, concerning the cost of one of several county-wide studies produced by another taxpayer in another case. (Pet. App. D, at 72a) The Respondent contradicted this speculation noting that the Class II studies in the other case used "canned" samples and could not have cost as much as Petitioner's figure. (Pet. App. D, at 85a-87a) There is a complete lack of evidence in the record to support Petitioner's allegation that a Class II study is cost-prohibitive to most taxpayers. Moreover, there is no specific evidence that it is cost-prohibitive to this Petitioner, an association of thirty-three taxpayers.

The record also discloses that the Illinois courts did not make any specific findings concerning the cost of a county-wide study. The trial court did note in its decision that a county-wide study would most likely cost more than a study limited to one township, and that such a cost might prohibit an "individual property owner" from pursuing a theory that other properties generally were under-assessed. (Pet. App. B, 34a-38a) But the trial court never made a finding as to what the cost of a county-wide Class II study would be, or that such a cost barred Petitioner and Illinois taxpayers generally from challenging their tax assessments. In particular, no finding of a "$17,000 cost" was made. (See, Pet. App. B, at 30a-41a.)

The Illinois Appellate Court also made no specific factual rulings on the cost of a county-wide study. The court noted in passing that "[Petitioner] contends that the burden on the taxpayer to show disproportionate assessment at the county level is too heavy." *Rosewell v. Twin Manors West of Morton Grove Condominium Assn.*, 175 Ill.App.3d 564, 568, 529 N.E.2d 1104 (1st Dist. 1988). It ruled, however, that:

> Even if it was unable to present a comprehensive study of countywide assessments of class 2 property, [Petitioner] might have produced some evidence of assessments of class 2 property within areas or townships in the county other than Maine Township.

Id., 175 Ill.App.3d at 573. Moreover, Petitioner neglected to include in its brief to the Illinois Appellate Court the allegations concerning "$17,000 cost" that it makes here.[3]

Respondent respectfully suggests that this Court apply its ordinary rule against deciding "questions not raised or litigated in the lower courts," *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987), and deny the petition for certiorari. This case is comparable to *Mishkin v. State of New York*, 383 U.S. 501 (1966), where this Court held that the appellant's questions concerning illegal searches and seizures were not presented by the record with sufficient clarity to require or justify review. 383 U.S. at 512-513. In *Mishkin*, the record disclosed a lack of evidence and findings by the lower courts in connection with the alleged illegal searches and seizures, and this Court accordingly dismissed a writ it had previously granted. *Id.* at 513.

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[3] The Illinois Supreme Court, the erroneous focus of the petition for certiorari, denied Petitioner ~~leave to~~ appeal. This was not a ruling on the merits concerning costs or any other issue.

The record in this case is similarly devoid of evidence and findings presenting Petitioner's constitutional contentions with sufficient clarity to justify this Court's review. Given the absence of clearly defined questions, this Court should deny the petition for writ of certiorari.

II.

THE REQUIREMENT THAT PETITIONER SHOW THE COUNTY-WIDE AVERAGE ASSESSMENT LEVEL TO SUPPORT ITS CLAIM OF DISCRIMINATION IS CONSISTENT WITH THE DOCTRINES OF DUE PROCESS AND EQUAL PROTECTION.

Respondent submits in the previous section of this brief that this Court should not accept review of Petitioner's equal protection and due process claims, because they turn upon arguments about the supposed cost of a statistical study which were not adequately litigated in the Illinois courts. Alternatively, Petitioner's claims must be rejected even if they are analyzed on their merits.

A. Requiring Evidence Appropriate To The Taxing Jurisdiction In Support Of A Claim Of Discrimination Is Consistent With The Rule Of Uniformity And Equal Protection In Property Tax Assessment.

The Illinois Appellate Court held in this case that for purposes of proving a violation of equal protection in real estate tax matters, the proper geographic area of comparison is the county and not an individual township. *Rosewell v. Twin Manors West of Morton Grove Condominium Assn.*, 175 Ill. App.3d 564, 529 N.E.2d 1104 (1st Dist. 1988). The court based its decision on the fact that both the Illinois Constitution and the Illinois Revenue Act provide for assessments to be made at the county level, such that assessments of property in Petitioner's class occur

throughout the county, as well as on the principle that practical rather than absolute uniformity and equality is the test.

Petitioner contends that it is unnecessary to establish the county-wide level of assessment to prove a violation of the Equal Protection Clause of the Fourteenth Amendment. Instead, Petitioner suggests that a violation of equal protection can be established by showing a spot disparity in apparent assessment valuation levels, limited to relatively small areas or pockets within the county such as a township. (Pet., at 30-38)[4] These contentions are refuted by this Court's previous rulings and by the undisputed facts of this case.

The broad latitude of the States in the area of taxation is well established. *E.g. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973). In its most recent decision concerning real property taxation, this Court reinforced the settled law that assessment discrimination must be *intentional and systematic* in order to violate the Equal Protection Clause. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, ____ U.S. ____, 109 S.Ct. 633, 639 (1989). Intentional, systematic undervaluation of other property may violate equal protection if it subjects an individual to taxes not imposed on others of the same class. *Id.* at 639; see also, *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352-53 (1918). However, "occasional errors of

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[4] Although Petitioner also suggests that the rejection of its basic claim violated due process, this aspect of its argument appears to turn on Petitioner's belief that the equal protection violation was established "to a 99.95% certainty." (Pet., at 36-37, n. 10) Accordingly, this response is confined to Petitioner's equal protection analysis.

state law or mistakes in judgment in valuing property" are not enough. *Allegheny, supra*, 109 S.Ct. at 638. Reasonable division of property into classes with different tax burdens is not unconstitutional, nor is the application of different assessment methods to property in the same class. *Id.* at 637-38.

> In each case, the constitutional requirement is the *seasonable attainment* of a *rough equality* in tax treatment of similarly situated property owners.

Id. at 638 (emphasis added).

In *Allegheny* the parties stipulated to a deliberate assessment policy applied to all property in West Virginia's Webster County. It was effectively uncontested that this policy, applied to admittedly comparable properties, had produced huge disparities in assessments which would not be equalized absent judicial intervention for up to five hundred years. *Allegheny, supra*, 109 S.Ct. at 635-37. In the instant case, no such systematic policy nor system-wide result was even alleged, much less shown. Unlike Webster County, Cook County reassesses all property in all classes at least every four years. Ill. Rev. Stat. 1987, ch. 120, ¶524.

Moreover, Petitioner neither claimed nor offered evidence of discrimination favoring other property *in its class*, which is spread throughout Cook County. Instead Petitioner confined its claim and proposed evidence to an alleged statistical variation in that portion of its class located in one of thirty-eight townships. Such evidence was categorically incapable of showing that Petitioner was subjected to taxes "not imposed on others of the same class," since sixty-nine percent (69%) of Petitioner's tax burden was accounted for by properties outside the area which the evidence addressed. See, *Allegheny, supra*, 109

S.Ct. at 639, quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

The Illinois Appellate Court's decision in this case that the proper geographic area is the county as opposed to any one individual township is in accord with the rulings of this Court that "the constitutional requirement is the *seasonable attainment* of a *rough equality*." *Allegheny*, *supra*, 109 S.Ct. at 638 (emphasis supplied). Practical uniformity or rough equality of assessment levels can exist throughout the county even though there might be a spot disparity in assessment levels within one individual township. Allowing taxpayers to rely on a mere showing of spot disparity would soon lead to chaos in the attainment of practical assessment uniformity. Assessment levels would be measured on a pocket-by-pocket basis until the county was reduced to a patchwork of pockets (townships) all with different assessment levels. This is especially true in a taxing jurisdiction like Cook County where property owners pay taxes to numerous different taxing districts which generally overlap township lines.

Other decisions of this Court further support the use of a county-wide level of assessment, reflecting the fact that counties are relatively typical assessment jurisdictions. In *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918), this Court compared the complaining taxpayer's assessment level to "other lands *within the county*." 247 U.S. at 353 (emphasis supplied). Similarly in *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923), reference is made to the allegation that the plaintiff's property was being assessed at 100 per cent of its true value while all other real estate *in the county* was being assessed at 55 per cent of its true value. On the other hand, Petitioner's contention that it would be sufficient to show a spot disparity within an assessment jurisdiction, such as a township disparity within a county, is without precedent.

Petitioner is apparently urging this Court to attempt to change the constitutional requirement to one of precise mathematical uniformity in tax assessment, while ignoring that the practical result of its approach would be disuniformity. For the reasons articulated in virtually all of this Court's decisions concerning equality in taxation, Petitioner's suggestion should be rejected.

B. Petitioner's Argument That Due Process And Equal Protection Should Allow It To Prove Assessment Discrimination With Less Evidence Than That Required Of Other Taxpayers Is Without Merit.

Petitioner's main argument is that requiring it to provide county-wide evidence of a statistical disparity in assessment levels within its class of property violates the Equal Protection and Due Process Clauses, because of the supposed cost of the evidence. (Pet., at 26-30, 22-26) This argument rests on two premises, both of which are insupportable. First, Petitioner assumes its conclusion that it is even possible to make out an assessment discrimination claim based on statistics for a small fraction of the assessment jurisdiction and class of property. Second, Petitioner argues that in rejecting such a fractional discrimination theory, Illinois has made it "utterly impossible" for taxpayers other than "the wealthy or large corporations with substantial taxes at risk" to prove that (the assumed) discrimination has occurred.

Contrary to Petitioner's apparent theory, this Court has rejected the notion that statutes "having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny." *Kadrmas v. Dickinson Public Schools*, ___ U.S. ___, 108 S.Ct. 2481, 2487 (1988). The Illinois courts' interpretation of Cook County's statutory assessment scheme should fare

no differently. Unless a statutory scheme interferes with a "fundamental right" or discriminates against a "suspect class," it will be upheld if a rational basis for the legislative classifications exists.[5] *Kadrmas, supra*, 108 S.Ct. at 2487. And as noted above, the States' latitude in the area of taxation is particularly broad. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, ____ U.S. ____, 109 S.Ct. 633 (1989); *supra*, part II.A.

Petitioner's due process analysis similarly lacks foundation. It argues that requiring statistical evidence of claimed assessment discrimination to address the entire assessment class and jurisdiction interferes with its right of "access" to the courts. (Pet., at 22-23, citing *Boddie v. State of Connecticut*, 401 U.S. 371 (1971), and *Little v. Streater*, 452 U.S. 1 (1981).) Nothing about Petitioner's claim or the Illinois courts' response to it involves access to the judicial process in the sense of *Boddie* or *Streater*.

Petitioner's tax objection was denied following a hearing on the legal issue raised by its limitation of the proposed assessment level evidence to the property within a township. Nothing in this adjudication remotely resembles the filing fee at issue in *Boddie v. State of Connecticut*, 401 U.S. 371 (1971), which precluded anyone who could not afford to pay from seeking a divorce in the first instance. Moreover, this Court's ruling that due process was violated rested on the fundamental character of the

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[5] Petitioner's reliance on *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) is obviously misplaced in this regard. (See Pet., at 29.) The Court's analysis in *Harper* rests firmly on the distinctive character of the right to vote as "fundamental." *Id.* at 670.

marital relationship and the State's monopolization of the means of dissolving it through the courts. *Boddie*, *supra*, 401 U.S. at 382-83. In subsequent cases the Court has declined to extend the rule of *Boddie* to fees required as a prerequisite to seeking discharge in bankruptcy, *U.S. v. Kras*, 409 U.S. 445 (1973), or to fees required as a prerequisite to appealing the denial of welfare benefits, *Ortwein v. Schwab*, 410 U.S. 656 (1973). Petitioner's interest in its tax reduction is much more similar to the financial interests in *Kras* and *Ortwein* than to the marital relationship in *Boddie*.

Petitioner's reliance on *Little v. Streater*, 452 U.S. 1 (1981), is similarly misplaced. There, this Court overturned a rule requiring indigent defendants in paternity actions to bear the cost of blood tests which might disprove paternity. The Court relied on the importance of the private interests at stake; an unusual provision of Connecticut law making it impossible to defeat a prima facie claim of paternity by the defendant's testimony; and the unusually conclusive character of blood test evidence, in holding that the State must pay for the test in cases of indigency. To hold otherwise, the Court concluded, raised a serious risk of erroneous adjudications and denied indigent defendants a meaningful opportunity to be heard. *Streater*, 452 U.S. at 12-17. Again, neither the interests asserted by the Petitioner here nor the results of the ruling it attacks resemble those in *Streater*.

More fundamentally, however, neither *Boddie* nor *Streater* nor any reported decision approaches a constitutional theory such as Petitioner advances here. Petitioner does not merely propose that the evidentiary costs of which it complains be shifted from it. Rather, Petitioner's theory is that the substantive law governing its claim, in this instance a claim of discrimination, must be

altered to obviate the need for the supposedly costly evidence. Respondent respectfully suggests that no decision of this Court even remotely supports thus changing the law to suit the litigant.

CONCLUSION

For the foregoing reasons, Respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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